82 - 1664

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT S. CHAPPELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petition for Certiorari — Criminal Case

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court err and violate the Petitioner's right under the Sixth Amendment to be confronted with the witnesses against him when it permitted the Assistant United States Attorney to read to the jury portions of a purported transcript of an interview of a deceased former employee of the Petitioner's Corporation, where at the interview neither the Petitioner nor his counsel were present to cross-examine?

2. Did the District Court err and violate the Petitioner's right under the Sixth Amendment to be confronted with the witnesses against him when it admitted as evidence documents purporting to be books and records of the Petitioner's corporation when the documents had been kept and maintained by a former employee who was deceased at the time of trial?

LIST OF PARTIES

All parties appear in the caption of the case in this Court.

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PETITION FOR CERTIORARI
CRIMINAL CASE

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit [hereinafter Seventh Circuit] issued on January 14, 1983, has been reported at 698 F.2d 308 (7th Cir. 1983). (App. p. 1a) A Petition for Rehearing was timely filed and denied by the Seventh Circuit on February 10, 1983. (App. p. 11a).

The Seventh Circuit affirmed a judgment of the United States District Court for the Southern District of Indiana [hereinafter District Court] issued on March 1, 1982. (App. p. 12a).

JURISDICTIONAL GROUNDS IN THIS COURT

The judgment of the Seventh Circuit was entered on January 14, 1983, and an order denying a Petition for

Rehearing was issued on February 10, 1983. The judgment of the District Court was entered on March 9, 1982. The jurisdiction of this Court is envoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment of the United States Constitution which provides in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

2. The statute under which the Petitioner was prosecuted, although nothing turns on its terms, was 18 U.S.C. §1341 which provided in pertinent part as follows:

"§1341 Frauds and Swindles"

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the post office department, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereof, or at the place at which it is directed to be delivered by the persons to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than 5 years, or both."

STATEMENT OF THE CASE

The facts necessary to place in their setting these questions raised can be briefly stated:

In November of 1981 the Petitioner was tried by jury in the United States District Court for the Southern District of Indiana on an 11 count indictment charging 10 counts of violations of 18 U.S.C. §1341 and 1 count charging a violation of 18 U.S.C. §2314. The verdict of the jury after almost two weeks of trial, acquitted the Petitioner on the sole count charging a violation of 18 U.S.C. §2314 and further acquitted the Petitioner of 8 of the 10 counts charging a violation of 18 U.S.C. §1341. However the jury found the Petitioner guilty of 2 counts of violating 18 U.S.C. §1341.

On March 1, 1982 the District Court issued its Judgment and Commitment Order (App. p. 12a), committing the Petitioner to the custody of the Attorney General for imprisonment for three years on count 10 of the indictment and two years on count 11 of the indictment. The Court further ordered that execution of the sentence on count 11 be suspended and the Petitioner placed on probation for a period of four years with the period of probation on count 11 to be consecutive to the sentence imposed on count 10 including any parole or other supervision time.

During the trial the District Court, over the Petitioner's objection, admitted government exhibits 16(A)-(K) and permitted the government to read to the jury portions of government exhibit 16(L). Exhibits 16(A)-(K) consisted of alleged books and records of Petitioner's corporation which had been received by the government from Mr. Tony Ricci, who was alleged to be the bookkeeper for Petitioner's corporation. Exhibit 16(L) which was read to the jury over Petitioner's objection consisted of a transcript of an ex parte statement taken by the government from Mr. Ricci at the time the government received the books and records. The government took the statement and received the exhibits on May 2, 1977 and Mr. Ricci died on October 29, 1978. At the time the trial commenced on November 9, 1981 Mr. Ricci was unavailable to testify by reason of his death.

Exhibits 16(A)-(K), which had been identified by Mr. Ricci in his ex parte statement Exhibit 16(L), were the only books and records of Petitioner's corporation. The exhibits were used by the governments' witnesses to develop or generate a purported cash flow chart for Petitioner's corporation which was the subject of extensive testimony by government witnesses and which purported to show that hundreds of thousands of dollars paid by investors to Petitioner's corporation were misappropriated. Thus the books and records became the central thrust of the government's case and the District Court's error in admitting those records necessarily affected the jury's verdict.

THE EXISTENCE OF JURISDICTION BELOW

The Petitioner was convicted in the United States District Court for the Southern District of Indiana of 2 counts of mail fraud under 18 U.S.C. §1341.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit has decided an important question of federal evidentiary law which has not been but should be settled by this Court.

The Seventh Circuit misapprehended the law in regard to the confrontation clause of the Sixth Amendment and in particular as to the admission of the ex parte statement of Ricci, Exhibit 16(L) and of the purported books and records of Petitioner's corporation as Exhibits 16(A)-(K). The Seventh Circuit properly noted that under *Ohio v. Roberts*, 448 U.S. 46 (1980) admissibility of evidence in the absence of the declarant depends upon adequate "indicia of reliability". In *Roberts* this Court held that reliability can be inferred without more in a case in which the evidence falls within a "firmly rooted hearsay exception" but that in other cases the evidence must be excluded absent a showing of "particularized guarantees of trustworthiness".

The Seventh Circuit determined that Ricci's testimony did not fall within a hearsay exception but was defined as not being hearsay pursuant to Rule 801(d)(2)(D) of the Federal Rules of Evidence (F.R.E.) (App. p. 7a). The Seventh Circuit further noted correctly, that the exclusion of party admissions from the definition of hearsay was not grounded on any probability of trustworthiness, but rather on the idea that a party cannot object to his failure to cross-examine himself. However, such rationale for excluding party admission from the definition of hearsay is absent when the definition of the party admission is expanded to include agents of the party.

The Seventh Circuit then properly noted that in the case of an admission by an agent, as here, a separate confrontation clause analysis is necessary. The Seventh Circuit then erred and misapprehended the law and the Sixth Amendment in determining that admissions of an agent under F.R.E. 801(d)(2)(D) satisfied confrontation clause analysis by analogy to extra judicial statements of co-conspirators which are admissible under F.R.E. 801(d)(2)(E). The Seventh Circuit's conclusion that confrontation clause analysis under F.R.E. 801(d)(2)(D) is met by analogy to F.R.E. 801(d)(2)(E) is in error, is unprecedented and indeed is not even suggested by any reported authority.

F.R.E. 801(d)(2)(E) is much narrower and more tightly drawn to protect the rights of an accused, than is F.R.E. 801(d)(2)(D). The fact that the former may meet confrontation clause analysis does not mean that the latter does.

F.R.E. 801(d)(2)(E) is applicable only in circumstances in which a statement by a co-conspirator is made "in furtherance of a conspiracy". See, 4 *Weinstein and Burger, Weinsteins' Evidence*, ¶801(d)(2)(A) and [01](1981), at page 801-138 to 801-139 and paragraph 801(d)(2)(E)[01].

The draftsmen of the Federal Rules of Evidence

departed from the conclusion of the draftsmen of the Model Code of Evidence that the "in furtherance" requirement should be eliminated. The draftsmen of the Federal Rules retained the traditional limited "in furtherance" requirement in F.R.E. 801(d)(2)(E) for the purpose of protecting the accused from conviction upon "loose" and unreliable testimony. *Weinstein, supra,* at p. 801-170.

Thus, F.R.E. 801(d)(2)(E) requires a showing that a statement was made "in furtherance of the conspiracy" but F.R.E. 801(d)(2)(D) requires no such showing that the agent made his admission or statement in furtherance of any criminal plan. That distinction alone is sufficient to destroy the analogy created by the Seventh Circuit between F.R.E. 801(d)(2)(D) and (E).

The government never contended that Ricci's statement to the government agents was made in furtherance of any criminal plan. In fact it was not even made in the scope of his employment duties for Petitioner's corporation. The Seventh Circuit correctly noted in its opinion (at App. p. 7a) that Ricci was no longer on the payroll of Petitioner's corporation at the time he made the statement. He was "acting as General Oil's bookkeeper" only in the sense that he had physical possession of books and records.

If Ricci had been considered as a co-conspirator of Petitioner and if the government had sought to introduce his ex parte statement pursuant to F.R.E. 801(d)(2)(E) its effort would have been conclusively rejected, because Ricci was not acting "in furtherance" of anything other than the government's request to him.

In regard to the admission into evidence of the books and records of Petitioner's corporation Petitioner contends that the Seventh Circuit erred in its conclusion that the books and records were admissible under confrontation clause analysis because they fit "within a firmly rooted hearsay exception" (App. p. 8a). The hearsay exception to which the Seventh Circuit had reference is F.R.E. 803(6) dealing with

admissibility of business records. One of the requirements of F.R.E. 803(6) is an indication of trustworthiness. As the Seventh Circuit noted the most important evidence of trustworthiness of the books and records was portions of Ricci's testimony (App. p. 7a). If the admissibility of Ricci's testimony falls, then the admissibility of the books and records falls in turn. Admissibility of the books and records cannot be "bootstrapped" by reference to Ricci's testimony, when Ricci's testimony itself should have been held inadmissible under confrontation clause analysis.

In summary the confrontation clause of the Sixth Amendment prohibits the admission of an out of court declaration which does not fall within a "firmly rooted hearsay exception" and which does not show "particularized guarantees of trustworthiness". *Ohio v. Roberts, supra,* at 66. The testimony of Tony Ricci, by the Seventh Circuit's own analysis, does not fall within a firmly rooted hearsay exception. Neither did the testimony demonstrate particularized guarantees of trustworthiness. The analogy drawn by the Seventh Circuit between F.R.E. 801(d)(2)(D) and 801(d)(2)(E) is wrong.

CONCLUSION

The Judgment below is a unique and unprecedented departure from the requirement of the Sixth Amendment to the Constitution that the accused must be confronted with the witnesses against him. The Court below has decided an important question of federal evidentiary law which has not been but should be settled by this Court. This Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 82-1382

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT S. CHAPPELL,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana.
No. IP 79-50-CR—William E. Steckler, *Judge.*

ARGUED OCTOBER 25, 1982—DECIDED JANUARY 14, 1983

Before CUMMINGS, *Chief Judge*, WOOD, *Circuit Judge*, and MAROVITZ, *Senior District Judge.**

MAROVITZ, *Senior District Judge.* Appellant, Robert S. Chappell, appeals a two count conviction for mail fraud, 18 U.S.C. § 1341.[1] Chappell allegedly devised and

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* The Honorable Abraham Lincoln Marovitz, Senior District Judge of the Northern District of Illinois, is sitting by designation.

[1] 18 U.S.C. § 1341 provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses,

(Footnote continued on following page)

carried out a scheme to defraud investors in his company, General Oil, Inc., by making certain specific misrepresentations concerning the use of the funds invested and potential returns. Count I of the indictment set forth the alleged scheme to defraud which was then incorporated by reference into each of the remaining ten counts.[2] Each count pertained to a different investor and each count alleged a specific mailing.

A jury convicted Chappell on Count 10 which concerned a letter from Chappell addressed to Gene and Lloyd Sellers, and on Count 11 which concerned a letter from Chappell to Andrew Hasenour. Both letters were dated April 14, 1977. On appeal, Chappell contends: 1) that insufficient evidence was presented at the trial to convict him of the crime of mail fraud; and 2) that the trial judge erred in admitting into evidence certain documents purporting to be the books and records of Chappell's corporation, and in permitting the District Attorney to read to the jury portions of a transcript of an interview with a deceased former employee of the corporation. After a full review of the record, we find Chappell's arguments to be without merit and therefore affirm his conviction.

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[1] *continued*
representations or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

[2] The original indictment charged 12 counts of mail fraud and 3 counts of inducing persons to travel in interstate commerce in execution of a scheme or artifice to defraud. 18 U.S.C. § 2314. Prior to trial 4 counts were dismissed, leaving 10 counts charging mail fraud and 1 count charging the inducement of persons to travel in interstate commerce.

Facts

In March 1975, Chappell formed General Oil, Inc., under the laws of the State of Indiana. Shortly thereafter, he purchased the oil and gas rights to a 150 acre tract of land located in Warren County, Pennsylvania from Maurice Dickey. There were regularly producing oil wells located all around the tract of land and it was regarded as a likely location for the production of oil. Chappell then filed a Schedule D offering with the Securities and Exchange Commission (the "SEC") concerning the first oil well to be drilled. Basically, a Schedule D is a question and answer form intended to provide information to potential investors in regard to the project. After the SEC approved the Schedule D, Chappell began to sell interests in the future oil wells. Each investor received a copy of the Schedule D and signed a copy of the Operating Agreement, which is the agreement between General Oil and each individual investor. Under the terms of the Schedule D and the Operating Agreement, investors bought only an investment in the oil wells, and did not become a shareholder in General Oil or entitled to any of the profits of the corporation.

The tract of land was large enough for thirty wells and investors were told that thirty wells would be drilled. Only ten wells were ever drilled. Nine of the wells produced oil, but only in very small quantities.

In March 1976, the SEC began an investigation of General Oil and Chappell, and eventually insisted that a separate Schedule D be filed for each well drilled. The SEC later began a civil action in the Southern District of Indiana, and in July 1976 Chappell and General Oil agreed to the entry of a consent decree whereby no new investors would be sought for the project.

There is no question that corporate funds were used to purchase commercial real estate in Indiana for the purpose of opening a business to sell fine art. Chappell also transferred to General Oil a motel located in Little Rock, Arkansas which he had purchased prior to starting the

corporation. The motel was carried on the books and records of the corporation and corporate funds were expended on it. Chappell also wrote checks on the corporate checking account for personal and family expenses including support payments to his wife. The books and records of General Oil apparently accurately reflected these expenditures which were charged to Chappell personally.

In April 1977, the SEC renewed its investigation of Chappell. On April 21, 1977, representatives of the SEC took Chappell's testimony, and at that time he indicated that certain books and records of the corporation were in the possession of Anthony Ricci, who was located in Florida.

On May 2, 1977 representatives of the SEC's Florida office took testimony from Ricci. They also received the books and records of the corporation that were in his possession. At Chappell's trial, these books and records were received into evidence, over objection, as Government Exhibits 16A-K. Portions of Ricci's testimony as given to the SEC were read to the jury, but the transcript itself (Government Exhibit 16L) was not admitted as evidence. Ricci had died over a year before trial.

Sufficiency of the Evidence

Chappell first contends that the evidence pertaining to the counts on which he was acquitted may not form the basis for inferences against him on Counts 10 and 11. He claims that the convictions on Counts 10 and 11 must stand or fall on their own weight and that there was insufficient evidence presented on those counts to support a conviction. Basically, Chappell claims that the mailings alleged in Counts 1 through 9 covered a time span up to and including April 12, 1977, and that his acquittal on those counts shows that the jury felt that there was no scheme to defraud up to that period in time. Therefore, Chappell argues that it is logically inconsistent for the jury to convict him on Counts 10 and 11 since the mailings alleged in those counts occurred just two days

later on April 14, 1977. Chappell offers no support for this theory and in fact this precise argument was rejected in *United States v. Reicin*, 497 F.2d 563 (7th Cir. 1974).

As the *Reicin* court so aptly stated. "[t]his assault by defendant on his conviction stems primarily from his narrow view of a mail fraud charge. . . ." *Id.* at 567. Chappell has not viewed the evidence as a whole or in the light most favorable to the Government and has generally ignored the function of the jury in a criminal trial. The evidence presented concerning the various investors overlaps and cannot be viewed in a vacuum. *See United States v. Hutul*, 416 F.2d 607, 617 (7th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). The fact that the jury acquitted Chappell on nine of the eleven counts does not mandate the conclusion that the jury determined that there was no overall scheme to defraud investors. In analyzing the verdict, Chappell has failed to take into account the possibility that the jury might have been exercising "its historic power of lenity." *United States v. Carbone*, 378 F.2d 420, 423 (2nd Cir. 1967), *cert. denied*, 389 U.S. 914 (1967). As pointed out in *United States v. Fox*, 433 F.2d 1235, 1238 (D.C. Cir. 1970), "juries frequently convict on some counts but acquit on others, not because they are unconvinced of guilt, but simply because of compassion or compromise." Chappell has invited us to speculate as to why the jury acquitted him on the first nine counts and yet convicted him on the remaining two counts. We decline to do so, for such speculation cannot overturn a verdict. *Dunn v. United States*, 284 U.S. 390, 394, 52 S.Ct. 189 (1932).

Chappell also contends that the mailings alleged in Counts 10 and 11 were mailed after any alleged scheme reached fruition and therefore they were not mailed for the purpose of executing a scheme to defraud as required by the statute. Chappell argues that the letters were mailed after he received the money from the investors involved, and therefore the scheme to defraud had already been completed at the time of the mailing.

This argument is wholly without merit. The April 14, 1977 letters gave the investors a status report on the

production of oil over the winter, and also stated that any action to sell the oil lease was being postponed due to the prospect of an increase in the price of oil. Precedent has established that the use of the mails to "lull" victims into a false sense of security may be "for the purpose of executing" a scheme to defraud, even though the mailings were made after the money had been fraudulently obtained. *United States v. Shelton*, 669 F.2d 446 (7th Cir. 1982); *United States v. Wrehe*, 628 F.2d 1079 (8th Cir. 1980). After viewing the documents and the circumstances surrounding their mailing, we are satisfied that sufficient evidence was presented for a jury to construe them as "lull" letters designed to mislead the investors into a false sense of security.

Alleged Trial Errors

Chappell maintains that the trial judge erred in admitting the books and records of General Oil into evidence and in permitting the Government to read to the jury portions of Ricci's testimony to the SEC. Specifically, Chappell claims that both the documents and the testimony constituted inadmissible hearsay and that their admission violated the Confrontation Clause of the Sixth Amendment.

At trial, the Government argued that the books and records were admissible under the Federal Rules of Evidence ("FRE") 804(b)(5) and 803(24) which are the catch-all exceptions to the hearsay rule, and under 803(6) which is the exception allowing the introduction of business records. The trial court, after a lengthy hearing, admitted the documents under FRE 803(6), 804(b)(5), and 801(d)(2)(D) which defines admissions by a party-opponent through an agent as not hearsay. Ricci's testimony to the SEC was also admitted under Rule 801(d)(2)(D). At oral argument, counsel for the Government relied on Rule 803(6) as the basis for the admissibility of the documents and therefore we will limit our discussion to that rule.

FRE 803(6) classifies business records as admissible hearsay if they are kept in the course of a regularly con-

ducted business activity, and if it was the regular practice of that business activity to make the records, as shown by the testimony of the custodian or other qualified witness. The records are not to be admitted however, if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. Fed. R. Evid. 803(6).

Chappell argues that the records were not admissible under Rule 803(6) because there was no showing that they were reliable or trustworthy. Actually, Chappell does not dispute the reliability of the records, only the Government's ability to lay a proper foundation for them since Ricci, the custodian, had died prior to the trial.

To support the reliability of the records, the Government offered the testimony of two former employees of General Oil who both stated that Ricci was the bookkeeper for the company. SEC agent Paul testified that Chappell told him that Ricci was maintaining the books of General Oil. Paul also testified that he was a licensed Certified Public Accountant and that he examined the books and records obtained from Ricci and that they appeared to be records made in the ordinary course of business. He further testified that he corroborated the information contained in the books and records with checks, bank statements and other records and found that all the entries appeared accurate. Finally, and most importantly, the Government offered portions of Ricci's testimony as given to the SEC in May 1977. In that testimony Ricci stated that he was the accountant for General Oil and that he maintained the books and records. He also identified each of the exhibits and described how he posted entries and prepared schedules. This testimony was clearly admissible under FRE 801(d)(2)(D). That rule defines as not hearsay any admission by a party-opponent through his agent concerning a matter within the scope of the agency, if made during the existence of the relationship. While it is true, as Chappell asserts, that Ricci was no longer on the General Oil payroll at the time that he gave testimony to the SEC, he was nonetheless still acting as General Oil's

bookkeeper. Only twelve days prior to Ricci's testimony, Chappell himself told the SEC that Ricci was still acting as General Oil's accountant and that the books and records were still in Ricci's possession. Ricci's testimony, properly admitted as an admission by a party-opponent, laid the foundation for the admission of the General Oil books and records. Chappell's allegations of error regarding the admission of the documents and the testimony are therefore without merit.

Chappell's final argument is that regardless as to whether the records and testimony were admissible under various exceptions to the hearsay rule, their admission violated his Sixth Amendment right to confrontation.

In *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980), the Supreme Court reviewed the overlapping character of the hearsay exceptions and the Confrontation Clause. The Court noted that the Confrontation Clause countenances only hearsay testimony which is marked with trustworthiness. As summarized by Justice Blackmum,

> when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that [the declarant] is unavailable. Even then, [the declarant's] statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded at least absent a showing of particularized guarantees of trustworthiness.

448 U.S. at 66, 100 S.Ct. at 2534 (footnote omitted).

In view of Ricci's death prior to the trial, there can be no question as to the unavailability of the hearsay declarant. The books and records clearly fell within a firmly rooted hearsay exception and reliability can be inferred as to them. Ricci's testimony, as a party admission, does not fall into a hearsay exception but rather is defined

as not hearsay. Fed. R. Evid. 801(d)(2)(D). The exclusion of party admissions from the definition of hearsay, unlike most hearsay exceptions, is not grounded on a probability of trustworthiness but rather on the idea that a party cannot object to his failure to cross-examine himself. *See* 4 Weinstein and Berger, *Weinstein's Evidence* ¶801(d)(2)[01] (1981). Therefore, in the case of an admission by an agent, a separate Confrontation Clause analysis would appear to be necessary. This Court has repeatedly held however, that extrajudicial statements properly admissible under FRE 801(d)(2)(E) (admissions by coconspirators) do not violate a defendant's Sixth Amendment rights. *United States v. Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977). The similarities between coconspirators and agents are readily apparent, and we see no reason to differentiate between them for Confrontation Clause analysis purposes. In any event, there clearly were adequate indicia of reliability surrounding Ricci's testimony. He gave his statement under oath, and it was recorded by a qualified court reporter. Although the reporter did not certify the transcript, the SEC attorney who questioned Ricci testified at the trial as to the reliability of the transcript. And while it is also true, as Chappell asserts, that Ricci was not subject to cross-examination, there is absolutely no reason to suspect that Ricci did not tell the truth. Chappell cannot point to any prejudice that resulted from the admission of Ricci's testimony, and has never questioned the accuracy of the books and records. Indeed, Chappell has steadfastly maintained that the records accurately reflect his personal transactions. Under these circumstances, we cannot conclude that Chappell's Sixth Amendment rights have been violated.

Conclusion

Although Chappell has presented resourceful arguments, he has been unable to convince us that there was insufficient evidence to convict him or that inadmissible evidence was allowed to reach the jury. Accordingly, the conviction is affirmed.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 10, 1983

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. ABRAHAM LINCOLN MAROVITZ,
Senior District Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 82-1382 vs.	No. IP 79-50-CR
ROBERT S. CHAPPELL, *Defendant-Appellant.*	William E. Steckler, Judge

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by defendant-appellant Robert S. Chappell, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Abraham Lincoln Marovitz, Senior District Judge of the Northern District of Illinois, is sitting by designation.

DEFENDANT: ROBERT S. CHAPPELL — DOCKET NO.: IP 79-50-CR

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH DAY YEAR: March 1, 1982

[ ] WITHOUT COUNSEL. However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL: James Bradford, his privately engaged counsel (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of: mail fraud in violation of 18 U.S.C. §1341, as charged in Counts 10 and 11(which counts were originally numbered counts 14 and 15) of the Indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

three (3) years on Count 10 of the Indictment and two (2) years on Count 11 of the Indictment.

IT IS FURTHER ADJUDGED that the execution of said sentence on Count 11 is hereby suspended and defendant placed on probation for a period of four (4) years. Such period of probation shall be consecutive to the sentence imposed on Count 10 including any parole or other supervision time.

SPECIAL CONDITIONS OF PROBATION

SPECIAL CONDITIONS OF PROBATION

In addition to the usual conditions of probation imposed above, it is hereby ordered that during the period of this payment be imposed. The Court may change the conditions of probation, extend the period, or revoke probation for violation of any of these conditions at any time prior to the expiration or termination of the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer.

SIGNED BY: [X] U.S. District Judge — William E. Steckler

[ ] U.S. Magistrate

DATE: March 1, 1982

170 F Supp. 16, Pg. 20